

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

SHARON BOBBITT, Individually and On)
Behalf of All Others Similarly Situated,)
Plaintiff,)
vs.)
ANDREW J. FILIPOWSKI, et al.,)
Defendants.)

)

No. 04-12263-PBS

MIKE TURNER, On behalf of Himself and)
All Others Similarly Situated,)
Plaintiff,)
vs.)
ANDREW J. FILIPOWSKI, et al.,)
Defendants.)

)

NO. 04-12294-PBS

**MEMORANDUM OF LAW IN SUPPORT OF MOTION
FOR CONSOLIDATION OF RELATED ACTIONS**

Lead Plaintiffs James Tito (“Tito”) and Frank Waddell (“Waddell”), individually and as trustee FBO Norma G. Waddell Revocable Trust, respectfully submit this memorandum of law in further support of their motion to consolidate *Sharon Bobbitt v. Andrew J. Filipowski*, 04-12263-PBS (the “*Bobbitt Action*”), and *Mike Turner v. Andrew J. Filipowski*, 04-12294-PBS (the “*Turner Action*”) (collectively, the “Actions”).

I. PRELIMINARY STATEMENT

As set forth herein, it is respectfully submitted that the Court should consolidate the *Bobbitt* and the *Turner* actions as both cases arise out of the same set of facts and circumstances.

II. PROCEDURAL HISTORY

The *Bobbit* Action is a consolidated action that was filed in the Northern District of Illinois on May 27, 2003. The *Bobbitt* Action alleges violations of the Securities Act of 1933 (“Securities Act”) and the Securities Exchange Act of 1934 (“Exchange Act”) and was brought on behalf of investors who purchased or otherwise acquired shares of divine, Inc. (“divine”) during the relevant time period. In addition, the *Bobbitt* Action asserts claims on behalf of former shareholders of various companies that were purchased by divine in stock-for-stock transactions.

Several months later, in September 2003, the *Turner* Action was filed in the Circuit Court of Cook County, Illinois asserting violations of the Securities Act on behalf of certain investors who acquired shares of divine through divine’s acquisitions of eshare Communications and Delano Corporation during the relevant time period. The facts of the *Turner* Action are virtually the same as in *Bobbitt* except that the *Bobbitt* Action is broader and asserts claims under the Exchange Act for an extended class period.

On October 29, 2003, the *Turner* Action was removed to federal court and then transferred with the *Bobbitt* Action to this Court in October 2004.

III. ARGUMENT

A. THE COURT SHOULD CONSOLIDATE THE ACTIONS

The Actions each assert class claims on behalf of those who purchased or otherwise acquired shares of divine for alleged violations of the Securities Act and/or the Exchange Act during the relevant time period. The Actions name most of the same defendants and involve the same factual and legal issues. Indeed, the claims asserted in the *Turner* Action are already covered by the claims asserted in the *Bobbitt* action. Moreover, they are each brought by investors who purchased or otherwise acquired divine shares during the relevant time period in

reliance on the integrity of the market for such securities and were injured by the fraud on the market that was perpetrated through the issuance of materially false and misleading statements and concealment of material information, thus artificially inflating the prices of divine securities at all relevant times. Consolidation is appropriate where there are actions involving common questions of law or fact. Fed. R. Civ. P. 42 (a). *See In re PRI Automation, Inc. Sec. Litig.*, 145 F. Supp. 2d 138 (D. Mass. 2001). That test is met here and, accordingly, the Actions should be consolidated.

Pursuant to the procedures set forth in the PSLRA, on August 19, 2003, pursuant to 15 U.S.C. §78u-4 *et seq.*, Judge Samuel Der-Yeghiyan appointed Tito and Waddell as lead plaintiffs and approved their selection of Cauley Geller Bowman and Rudman LLP¹ and Stull Stull & Brody as lead counsel. When a later action is filed that relates to a previously-consolidated action, it is appropriate to consolidate that action without disturbing the leadership structure of the consolidated action. *See, e.g., In re Krispy Kreme Doughnuts, Inc. Sec. Litig.*, 04-cv-00416 (Order, dated Feb. 3, 2005) (attached hereto as Exhibit A) (consolidating later-filed case with consolidated action and leaving lead plaintiff and lead counsel structure undisturbed). Accordingly, Tito and Waddell should continue to serve as lead plaintiffs for the Class and their counsel should continue to serve as Lead Counsel.

¹ Effective May 1, 2004, the law firm of Cauley Geller Bowman & Rudman LLP ceased to operate. The attorneys handling this action from Cauley Geller Bowman & Rudman LLP are now associated with the law firm of Lerach Coughlin Stoia Geller Rudman and Robbins LLP.

IV. CONCLUSION

For the foregoing reasons, Tito and Waddell respectfully request that the Court consolidate the above-captioned actions for all purposes.

Respectfully submitted,

DATED: March 8, 2005

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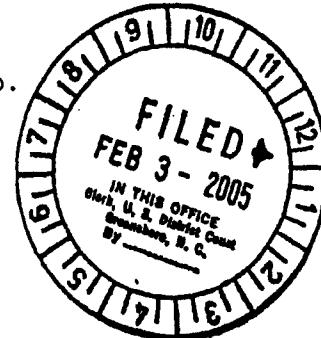
Lead Counsel for Plaintiffs and the Class

EXHIBIT A

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

In re KRISPY KREME DOUGHNUTS,) Master File No.
INC., SECURITIES LITIGATION,) 1:04CV00416
This document relates to:)
All Actions)



ORDER OF CONSOLIDATION

On June 14, 2004, this court entered an order consolidating all previously filed proceedings similar to the claims filed in Eastside Investors v. Krispy Kreme Doughnuts, Inc., Randy, S. Casstevens, Scott A. Livengood, Michael C. Phalen and John W. Tate, 1:04CV416. For good cause shown and in the interest of efficient administration, all similar cases filed after the order of June 14, 2004, should be consolidated.

IT IS THEREFORE ORDERED that the proceeding Bond Nichols, on behalf of himself and all others similarly situated v. Scott Livengood and Michael Phalen, 1:05CV42, shall be consolidated with other proceedings heretofore consolidated by the order of June 14, 2004.

IT IS FURTHER ORDERED that the caption "Class Action" set forth in Master Docket and Caption in the Stipulation and Consolidated Order of June 14, 2004, shall be deleted from all future pleadings in these consolidated actions.

IT IS FURTHER ORDERED that any party may file an objection to this order within thirty (30) days after the entry of this order.

This the 3rd day of January ^{February} 2005.

Jeanne L. Okeen
United States District Judge